Supreme Court, U.S.
FILED
NOV 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOCALS 17, 135, 257 AND 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioners

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

---

PETITIONERS' REPLY MEMORANDUM

Of Counsel:
WILLIAM J. DEALY
MARK WINES
MANNING, RAAB, DEALY & STURM
410 Park Avenue South
New York, New York 10016
(212) 683-6699

JOHN A. CIRANDO
D.J. & J.A. CIRANDO
410 State Tower Building
Syracuse, New York 13202
(315) 474-1285

JOHN F. DEALY
Counsel of Record

PAUL F. MICKEY, JR.
GADI WEINREICH
KENNETH M. WILLNER
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Petitioners

November 4, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

I. RESPONDENT, LIKE THE NEW YORK COURT OF APPEALS, FAILS TO RECOGNIZE THIS COURT'S REQUIREMENT THAT INVESTIGATIVE INFRINGEMENTS OF FIRST AMENDMENT RIGHTS SATISFY THE "LEAST INTRUSIVE ALTERNATIVE" TEST 2

II. LIKE THE NEW YORK COURT OF APPEALS, RESPONDENT FAILS TO RECOGNIZE THAT THE OVERBROAD SUBPOENAS IMPERMISSIBLY CHILL UNION MEMBERS' EXPRESSIVE ACTIVITIES 4

III. THE CASE IS NOT MOOT BECAUSE THE DISTRICT ATTORNEY CONTINUES TO USE THE MEMBERSHIP LISTS IN HIS ONGOING INVESTIGATION 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases: Page

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982) 2
Buckley v. Valeo, 424 U.S. 1 (1976) 2
In re Read, 88 L.R.R.M. (BNA) 3310 (S.D.N.Y. 1974) 4
Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n, 667 F.2d 267 (2d Cir. 1981) 2, 4
Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968) 5
Shelton v. Tucker, 364 U.S. 479 (1960) 2, 5
United States v. Friedman, 532 F.2d 928 (3rd Cir. 1976) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-400

LOCALS 17, 135, 257 AND 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioners

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

---

PETITIONERS' REPLY MEMORANDUM

Petitioners, Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereby submit their Reply Brief in response to the Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opp.") filed by Respondent People of the State of New York on October 28, 1988.[1]

---

[1] Respondent's Opposition to the Petition for Certiorari mischaracterizes the facts of this case. Petitioners will not attempt to cure all factual inaccuracies, but strongly dispute the suggestion that the local unions involved in this case have "a long history of corruption." That allegation is unsupported, inaccurate, and an attempt to color the Court's judgment of the legal issues presented.

I. RESPONDENT, LIKE THE NEW YORK COURT OF APPEALS, FAILS TO RECOGNIZE THIS COURT'S REQUIREMENT THAT INVESTIGATIVE INFRINGEMENTS OF FIRST AMENDMENT RIGHTS SATISFY THE "LEAST INTRUSIVE ALTERNATIVE" TEST

Respondent makes the startling assertion that "there is no dispute between the parties with respect to the standard for judging whether the state's subpoenas impringe inappropriately on First Amendment interests . . . ." (Brief in Opp. at 11). To the contrary, there is a fundamental dispute on that point: Respondent, like the court below, has applied a two-step test and thus ignored the important third element of this Court's established test for First Amendment infringements—whether the government pursued its objectives using the least intrusive approach available to it. Respondent cites several decisions applying this third element, but consciously avoids all mention of it.[2]

Respondent does not contend that its subpoenas satisfied the "least intrusive approach" requirement, nor could Respondent plausibly do so. As Petitioners and the dissent below have noted, Respondent could have obtained

---

[2] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 68 (1976); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 273-74 (2d Cir. 1981). Respondent's attempt to place primary emphasis on *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), is misguided. The Brown decision considered the government's interest in compelling the disclosure of financial information about minor political parties. The Court found the government's interest was outweighed by the prospect of First Amendment injury; since the first element of the test was not met, the Court's failure to consider the third element is not surprising. Moreover, *Brown* relies on cases such as *Buckley* and *Shelton* that apply the "least intrusive alternative" requirement; accordingly, it cannot reasonably be read as endorsing a two-element test.

all the information it required through several less intrusive approaches. Appendix to Petition ("App.") at 18a-19a. The court below erred in failing to consider the third element of this Court's test and in failing to require that a less intrusive approach be employed in this case. This error raises a significant federal question worthy of this Court's consideration.

In contending that its subpoenas meet the second element of this Court's three-part test, Respondent asserts that the information sought bears a "substantial relation" to the purpose of the grand jury's investigation. (Brief in Opp. at 12). The only support for this bare assertion is Respondent's alleged *in camera* showing that possession of membership lists would serve its goal of identifying potential witnesses.[3] However, the District Attorney expressly stated that the purpose of obtaining social security numbers of 10,000 union members was to conduct a general exploration of union members' possible criminal records.[4] That sort of fishing expedition bears no substantial relation to the grand jury investigation; therefore, the request for social security numbers does not satisfy even the second element of this Court's test.

---

[3] Respondent makes several references to the *in camera* proceedings, Brief in Opp. at 4-5, 12-13, 17, stating at one point that "it is inconceivable that the hearing court did not pass on the [constitutional] question." *Id.* at 17. By contrast, Judge Titone, author of the dissent below, reviewed the *in camera* materials and stated that "there was absolutely no showing that the First Amendment implications were even considered and it appears that no balancing was done before or after the subpoenas were issued." App. at 18a. Respondent apparently has chosen not to submit a transcript of those proceedings to this Court. Presumably, Respondent would have submitted the transcript if it supported Respondent's view of the hearing court's inquiry.

[4] *See* App. at 27a.

II. LIKE THE NEW YORK COURT OF APPEALS, RESPONDENT FAILS TO RECOGNIZE THAT THE OVERBROAD SUBPOENAS IMPERMISSIBLY CHILL UNION MEMBERS' EXPRESSIVE ACTIVITIES

Respondent argues that requiring identification of union membership, including revealing social security numbers of 10,000 individual members, has not chilled protected union activity because union membership has not declined. Like the New York Court of Appeals, Respondent fails to recognize that overbroad subpoenas will chill union *expressive activities* as well as union membership. The fact that a grand jury is considering personal information concerning all members of a union may or may not lead people to forego the economic benefits of union membership; however, it will surely lead many to diminish their participation in the public and expressive activities of modern unions. As Petitioners noted in their Petition for Certiorari at 10, unions engage in extensive political activity, publish newspapers and pamphlets, and state controversial views concerning industrial relations. In *Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267 (2d Cir. 1981), the United States Court of Appeals for the Second Circuit recognized on the basis of similar facts that a chilling effect on First Amendment rights would be "inevitable." [5] *Id.* at 272.

Respondent argues that Petitioners have failed to advance facts demonstrating the chilling effect of the subpoenas. In fact, no such showing is required. As the Second Circuit noted in *Waterfront*, the Supreme Court has adopted a "commonsense approach" to identifying the existence of chill. *Waterfront*, *supra*, 667 F.2d at

[5] The government relies heavily on the case of *In re Read*, 88 L.R.R.M. (BNA) 3310 (S.D.N.Y. 1974). That case is readily distinguishable: the court emphasized that the government had easy access to the information demanded from other sources.

272 (citing *Shelton v. Tucker*, 364 U.S. 479 (1960); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968)). Employing the same commonsense approach and relying solely on the nature and scope of the subpoenas at issue, the Second Circuit found that chill would inevitably occur.[6]

This Court has sufficient information before it to conclude that chill is likely to occur; however, should it have any doubt on that point, the Court should remand the case to the New York courts to permit Petitioners to present facts supporting the allegation of chilling effect.

III. THE CASE IS NOT MOOT BECAUSE THE DISTRICT ATTORNEY CONTINUES TO USE THE MEMBERSHIP LISTS IN HIS ONGOING INVESTIGATION

Respondent's assertion that this case is moot is unfounded.[7] The District Attorney is still holding and using the membership lists in conducting his ongoing investigation, and may well use them in subsequent and unrelated investigations. *See* Petition at 4 n.4. Accordingly, this case presents the Court with a live controversy. Moreover, a ruling by this Court may avoid additional future controversy. If this Court were ultimately to determine that the subpoenas were illegal because they were overly broad, then the names, addresses, telephone and social security numbers acquired from the Petitioners would

---

[6] The commonsense approach is the only practical way to determine the likelihood of chill. When information is first demanded and a hearing on a motion to quash is convened, the future psychological impact of compliance with subpoenas cannot be demonstrated empirically. In this case, a year after Petitioners' compliance with the District Attorney's subpoenas, Petitioners are in far better position to marshal evidence to demonstrate chill.

[7] Significantly, Respondent represented to the Appellate Division of the Supreme Court of the State of New York that Respondent would not raise the issue of mootness on appeal if the Petitioners' motion to stay were denied.

have been obtained unlawfully. This determination would affect the use of that data in any ongoing or subsequent criminal or civil proceeding against any of the union members concerned. *See United States v. Friedman*, 532 F.2d 928, 931 (3rd Cir. 1976).

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, this Court should review and reverse the decision of the New York Court of Appeals.

Respectfully submitted,

Of Counsel:
WILLIAM J. DEALY
MARK WINES
MANNING, RAAB, DEALY & STURM
440 Park Avenue South
New York, New York 10016
(212) 683-6699

JOHN A. CIRANDO
D.J. & J.A. CIRANDO
410 State Tower Building
Syracuse, New York 13202
(315) 474-1285

JOHN F. DEALY
Counsel of Record

PAUL F. MICKEY, JR.
GADI WEINREICH
KENNETH M. WILLNER
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Petitioners

November 4, 1988